

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of September, two thousand four.

PRESENT: HON. DENNIS JACOBS,
HON. ROSEMARY S. POOLER,
HON. SONIA SOTOMAYOR,
Circuit Judges.

- - - - -X
DONTE DAISE,

Plaintiff-Appellant,

-v.-

03-0315-pr

GLENN S. GOORD, Commissioner, L. WAY, Deputy Superintendent for Security, M. WILLIFORD, Lieutenant - Review Officer; K. PASSNO, Sergeant, LT. MAJOR, LIEUTENANT - REVIEW OFFICER, LIEUTENANT DON, Hearing Officer, D. SCHOFIELD, Correctional Officer, GEORGE B. DUNCAN, Superintendent, WILLIAM PHILLIP, Deputy Superintendent for Security, LIEUTENANT ROBERTS, Review Officer, P. BRUCE,

Correctional Officer, DONALD
SELSKY, Director - Special Housing,
MICHAEL GIAMBRUNO, Superintendent,
K. PASSANO, Sergeant, M. STORMER,
Correctional Officer, SHOVAH,
LIEUTENANT, LT. BROCKWAY

Defendant-Appellees.

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APPEARING FOR APPELLANT: On Submission (**Donte Daise**,
pro se, Rome, NY)

APPEARING FOR APPELLEE: On Submission (**Martin A.**
Hovet, Andrea Oser,
Assistant Solicitors
General, Albany, NY, **Joel**
L. Marmelstein, Assistant
Attorney General, Utica,
NY, Elliot Spitzer,
Attorney General, Albany,
NY)

Appeal from the United States District Court for the
Northern District of New York (Tunheim, J.)*.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,
ADJUDGED AND DECREED that the judgment is **VACATED AND**
REMANDED.

Donte Daise appeals from a final judgment entered in
the United States District Court for the Northern
District of New York (Tunheim, J.), granting defendants'
motion for summary judgment and dismissing Daise's
claims. It is assumed that the parties are familiar with
the facts, the procedural context, and the specification
of appellate issues.

*Case referred to the Honorable John R. Tunheim, United
States District judge, sitting by designation in the
Northern District of New York.

Summary judgment is appropriate when, construing the evidence in the light most favorable to the non-moving party no genuine issue of material fact exists. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A district court's grant of summary judgment is reviewed de novo. Mack v. Otis Elevator Co., 326 F.3d 116, 119 (2d Cir. 2003). For the reasons stated in substance by the district court, Daise's Fourteenth Amendment claim, under 42 U.S.C. § 1983 was correctly dismissed on the basis of qualified immunity. Walker v. McClellan, 126 F.3d 127, 129 (2d Cir. 1997) (qualified immunity is proper grounds for summary judgment in civil damage suits against prison officials in § 1983 actions).

However, the district court erroneously dismissed the complaint altogether without reaching Daise's Eighth Amendment claim. Because "most pro se plaintiffs lack familiarity with the formalities of pleading requirements," this Court "must construe pro se complaints liberally, applying a more flexible standard to evaluate their sufficiency than [the Court] would when reviewing a complaint submitted by counsel." Lerman v. Bd. of Elections, 232 F.3d 135, 140 (2d Cir. 2000). Defendants emphasize that their motion for summary judgment characterized Daise's complaint as raising a single due process claim and contend that Daise abandoned his Eighth Amendment claim by failing to dispute that characterization. A claim that is explicitly raised in the complaint cannot be deemed waived by such a procedural error by a pro se plaintiff. See Salahuddin v. Coughlin, 781 F.2d 24, 29 (2d Cir. 1986) (liberally construing pro se papers "assures that a person unfamiliar with the lawyerlike method" will not be disadvantaged).

As defendants point out, the Salahuddin opinion, in which this court approved the dismissal of a pro se plaintiff's § 1983 claim at the summary judgment stage, noted that "at some point in a lawsuit even pro se litigants must make clear to the court their claims and the facts that they believe entitle them to specific relief." Id. at 29. Unlike the plaintiff in Salahuddin, however, Daise expressly pleaded in his amended complaint that he sought relief for violations of his civil rights "outlawed" by the "Eighth and Fourteenth Amendments."

As the district court did not reach the Eighth Amendment claim, final judgment was (at least) premature. We remand to the district court for proceedings on Daise's Eighth Amendment claim.

For the foregoing reasons, the district court's judgment is **VACATED AND REMANDED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

Lucille Carr, Deputy Clerk